Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-419

BRAHANEY DRILLING COMPANY and
LEATHERWOOD DRILLING COMPANY,
Consolidated Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above entitled consolidated cases on June 18, 1975, Petition for Rehearing denied on July 24, 1975, notification of which was received 8-1-75.

OPINION BELOW

The slip opinion of the Court of Appeals is reported at ___ F.2d ___, printed in Appendix A hereto. The Board's decision and order in Leatherwood Drilling Company case is reported at 209 NLRB #92, printed in Appendix B hereto, and in Brahaney Drilling Com-

pany case at 209 NLRB #93, printed in Appendix C hereto. The judgments enforced the Board's orders requiring the respective Petitioners to bargain with Local 826, International Union of Operating Engineers, AFL-CIO.

JURISDICTION

The judgments of the Court of Appeals, printed in Appendix A hereto, entered on June 18, 1975 and the Order Denying Rehearing was entered on July 24, 1975. Motion for Withdrawal of Mandate and Stay of Mandate was denied August 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

These consolidated cases arose when Petitioners withdrew union recognition more than two years after the certification year began. The withdrawals were based on good faith doubt of the union's continuing majority status. Both employers presented several grounds as forming the basis of their beliefs. The questions presented are:

1. Whether the Court below erred in misapprehending and in grossly misapplying the proper standards of review of National Labor Relations Board orders as required by the decision of this Court in *Universal Camera Corp. vs. NLRB*, 340 U.S. 474, 491; 71 S.Ct. 456, 466 (1951) by:
   (a) Limiting its power to disturb the Board's findings only upon a showing of abuse of discretion in an unfair labor practice case having to do with good faith doubt of a union's majority status and permitting the Board to

   rely upon its own surmise and unsupported by evidence.
   (b) Permitting the Board to isolate the various grounds of Petitioners' good faith doubt of the union's continuing majority status rather than requiring the Board to consider all of the elements as a whole.
   (c) Not requiring a shifting of the burden of proof to General Counsel after Petitioners presented sufficient evidence to cast serious doubt on the union's majority status.
2. Whether the Court below erred in holding the Board did not abuse its discretion in failing to follow its own guidelines in determining these Petitioners' good faith doubt of the union's majority status as set out in *Celanese Corp. of America*, 95 NLRB 664, 671-673 (1951) and approved by this Court in *Brooks vs. NLRB*, 348 U.S. 96, 75 S.C. 176 (1954).

(The opinion of the Court below is in direct conflict with a decision of this Court and with decisions in the Sixth, Seventh and Eighth Circuit Courts of Appeal, as well as with its own decisions.)

STATUTES

". . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . .". 28 U.S.C. 160(e), Public Law 61 Stat 136 Sec. 10(e).

STATEMENT OF THE CASE

These are companion cases consolidated for hearing and decision before the Circuit Court of Appeals for the Fifth Circuit. Both cases were heard by Administrative Law Judge Harmatz and the Board adopted his decisions in toto and the decisions by the Board were issued simultaneously. The Administrative Law Judge wrote his decision in Leatherwood first and in writing the Brahaney decision quoted liberally from the Leatherwood case and treated the cases identically. The Board took official notice of the record in the companion cases with respect to certain common issues to avoid repetition of testimony.

Both companies were oil and gas drilling contractors in the Permian Basin area of West Texas and southeast New Mexico. Brahaney owned 5 drilling rigs and Leatherwood owned 2 to 3 drilling rigs during the period. Brahaney withdrew recognition 2 years and 3 months after certification year began, and Leatherwood withdrew recognition 2 years and 5 months after certification year began. In Brahaney's case, the withdrawal was preceded by a 6 months period of no communication from the union. In Leatherwood's case, withdrawal was preceded by 10 1/2 months of no communication from the union.

In both cases, in addition to the above facts, Petitioners' good faith doubts were based primarily on (1) turnover of employees, and (2) union's long silence after last negotiating session. It was more than mere turnover or mere silence on the union's part. There

were certain significant facts and circumstances surrounding the turnover and silence that are very important.

The number of days required to drill a well vary from 7 days to about 70 days. The wells were drilled in the Permian Basin area of West Texas and southeast New Mexico.

Certain other significant facts in relation to both companies are set out as follows:

Fact	Brahaney	Leatherwood
Election date	4-11-68	2-11-69
Certification period started	3-9-71	11-6-70
Withdrawal of recognition	6-4-73	4-19-73
Varying number of employees needed	24 to 36	24 to 36
Number of eligible voters	23	77
Number of votes cast	17	21
Number of the eligible voters working as of May 31, 1973	None	3
Total number employed since election	1,591	1,761
Rate of turnover for each job	40 to 50	40 to 50
Rate of turnover during certification period for each job	21	26
Total employees during first 5 months of 1973	160	320
Per cent rate of turnover during first 5 months of 1973	667%	900%

Negotiating sessions during certification period (Brahaney: 3/9/71-6/4/73) (Leatherwood: 11/6/70-4/18/73)	6-22-71 1-20-72 3-14-72 4-14-72 7-21-72 10-13-72	3-8-72 4-18-72 6-22-72
Total hours of negotiations	16 hours	Not indicated in record.
No communication from Union (hiatus period)	From 10-13-72 to 5-31-73	From 6-22-72 to 4-19-73
Number of rigs operating during hiatus period	1 to 4 Average 2 1/2	Average 2 1/2
Number of wells drilled at different locations	1971-40 1972-17	1971-14 1972-71
5 months 1973	9	26

There were from 50 to 60 drilling contractors in the Basin owning about 300 rigs. The union claimed to represent a majority of the employees of 13 companies owning 63 rigs, or about 21%. It took about 3,000 roughnecks to man the rigs operating in the area. In 20 union elections in the drilling industry, there were 1247 eligible voters but only 923 votes cast, of which the Union received 396, or 42% of the total votes cast but only 31% of the eligible voters and only about 13% of the employees in the industry.

The union, during the certification period, was represented by the business agent and his assistant and occasionally an international representative. The union's geographical territory runs from El Paso,

Texas east to Brownwood, Texas; north to Wichita Falls, Texas; and west to the Texas - New Mexico line; and all of southern New Mexico. The union primarily represents gasoline plants and production companies. In addition it represents the employees at Johnson Manufacturing Company in Lubbock, Texas.

The union representatives never did go to the rigs nor did they know where the rigs were working or how many were working, except from hearsay picked up periodically.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is Clearly And Seriously A Misapprehension And A Gross Misapplication Of The Proper Standards Of Review Of NLRB Decisions And Orders By A Circuit Court Of Appeals As Enunciated By This Court In *Universal Camera Corp. vs. N.L.R.B.*

These consolidated cases raise substantial and important questions concerning the standards of review followed by the Court below in its enforcement of NLRB orders. It has misapprehended and grossly misapplied the standards of review as taught by this Court in *Universal Camera Corp. vs. NLRB, supra*, and is in conflict with that case.

First, the sole issue before the Board was whether Petitioners established reasonable grounds as bases for their good faith doubts of the union's majority status. It was incumbent upon the Board to consider all

the factual elements and then decide if all those factual elements, taken as a whole, could cause a reasonable person to have good faith doubts of the union's continuing majority status.

It was the function of the reviewing court to examine the record and decide if the Board properly followed the guidelines set out in *Celanese Corp. of America and Oil Workers International Union, CIO, supra*, in cases of this kind.

The Board, in adopting the Administrative Law Judge's decisions, in toto, was arbitrary and abused its discretion by the manner in which it treated the factual elements constituting the reasonable grounds for these Petitioners' doubts. The Court below merely sought ways to justify the Board's failure.

Second, the Court below accorded finality to the Board's findings and deemed itself to be the judicial echo of the Board's conclusions. After discussing the Board's "very broad" discretion in the administration of the Act with respect to the appropriateness of a bargaining unit and the certification of bargaining representatives, the Court below said:

> "A reviewing court will give 'special respect' to the Board's findings and disturb them only upon a showing of abuse of discretion."

That special respect is limited to the specific province where the Board is presumed to have expertise (determining bargaining units, certification of bargaining representatives and fashioning remedies), but it does

not apply to findings of fact in unfair labor practice cases as here involved. Furthermore, the Board abused its discretion as the following will demonstrate.

These are not cases where the Board chose between two equally conflicting inferences supported by substantial evidence as a whole. The Board's inferences or surmises were pure fabrications out of the mind of the Administrative Law Judge and are not supported by substantial evidence, while Petitioners' beliefs are supported by substantial and uncontradicted evidence. *NLRB vs. Coats & Clark, Inc.*, 231 F.2d 567 (1956). The relatively few negotiating sessions and the shortness of the sessions over 2 1/3 or more years; the vast geographical territory responsibility of the union; the limited union organizers and representatives available for contact of employees; the lack of knowledge of the union of who was employed by Petitioners at any given time; the union's non-visitation at the rigs of Petitioners; the small representation claimed by the union in the industry; its long delay in seeking negotiations; the extremely rapid turnover of employees of Petitioners; the departure of all of the eligible voters in Brahaney and all but 3 in Leatherwood; and the other factors involving the turnover are all facts in the record and would surely cause any reasonably knowledgeable person to doubt the employees were even aware of the union's existence and to most certainly doubt the rapidly changing employees wanted the union to represent them with these Petitioners. Not to have doubts under the circumstances is to deny any knowledge of human nature.

Third, the Court below uncritically accepted and followed the false trail laid out by the Board in misapplying the evidence and its meaning with respect to the controlling question and legal principle.

The question in each case was: Did the Petitioner have reasonable grounds for doubting the union's continuing majority status more than 2 years and 3 months after the certification year began?

The legal principle is set out in *Celanese Corp. of America and Oil Workers International Union, CIO, supra*, cited with approval by this Court in *Brooks vs. NLRB, supra*.

The principle is: After the certification is a year old, an employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided the doubt is in good faith.

It is only necessary to show the employer in good faith believed that the union no longer represented the majority of the employees. The employer must only show it had reasonable grounds for doubting the union's majority. It is not whether there was sufficient evidence to rebut the union's majority status, nor is it necessary to demonstrate that the union in fact did not represent a majority, as the Court below indicated was necessary.

The Board and the Court below are required to look at the totality of all the circumstances. Instead, the Board, with approval of the Court below, not only failed to take into consideration all the grounds for

doubt (see Statement of Facts above), but actually isolated the grounds it did consider and found each isolated ground, standing alone, insufficient to be a reasonable basis for a good faith doubt.

This is a further indication of the Board's arbitrariness and abuse of discretion.

Fourth, the Board and the Court below even then misapprehended the effect of the various grounds (as set out above) as to whether they were or were not capable of influencing the employer's belief. Succinctly, the facts in both instances were: a turnover in excess of 667% (Brahaney) and 900% (Leatherwood) in the 5 months preceding withdrawal of recognition; almost a complete turnover in employment every 2 weeks; constant movement of the actual place of employment; the union being shorthanded and covering such a wide territory resulting in its inability to contact the rapidly changing employees; its obvious reluctance to negotiate for long periods of time; the limited number of negotiating sessions and their briefness; the elapse of more than 2 years after certification and 4 and 5 years after the election; the vast number of employees hired over the years since the election; the negligible success of the union in organizing the drilling industry in the area; lack of contact between the union and employees; lack of any conversation on the rigs about the union; the union's minimal claim of representation in the industry; and the disappearance of all the eligible voters from the payroll of Brahaney and all but 3 in Leatherwood.

The Board and Court below found the extremely rapid turnover did not furnish reasonable grounds for a good faith belief of doubt of majority status because of what they said was the recognized inherent rapid turnover in the industry. Both cite the representation case of *Hondo Drilling Company*, 164 NLRB 416 (1967); affirmed *NLRB vs. Hondo Drilling Company*, 428 F.2d 943 (5th Ct., 1970) for the purpose of disregarding or avoiding the effect turnover would have on an employer's doubt.

The *Hondo* case, *supra*, was simply a case that determined the eligibility of voters in the drilling industry of West Texas because of its inherent rapid turnover, and has absolutely nothing to do with union majority status or with preventing turnover from being a factual bases for an employer's good faith doubt. The voting formula developed, as set out in footnote 1 of the opinion below, is tacit admittance on the part of the Board that it doubted the union could muster a majority vote under the normal rules of voting. According to the Board it was designed to protect the voting rights of employees who might have an expectancy of future employment but, even then, required 10 days employment during the previous 90 days without quitting or being terminated for cause. With almost 100% turnover every 2 weeks, it must be obvious the employees were quitting and would not be eligible to vote even under the Hondo formula.

The Board said, in devising the formula, it must be careful not to permit the question of union representation to be decided by those individuals that have no likelihood of re-employment with the employer. And

yet, that is exactly what the Board and the Court below are doing by their findings and rulings in these cases.

The question here was, not eligibility to vote, but whether the inherent and actual rapid turnover, its nature, its causes and effects, could and did cause the employers to doubt the union's majority status? The answer is yes, according to the uncontradicted evidence in the record.

In sustaining the Board and in excluding inherent rapid turnover and the circumstances surrounding it in an industry as a bases for an employer's doubt on such ground, the Court of Appeals has, in effect, held that in any industry with inherent rapid turnover, such turnover could never be a ground for a good faith doubt of a union's majority status. This is a novel theory, is contrary to human experiences, and is in direct conflict with the Board's own guidelines.

Fifth, the Court below uncritically adopted the Board's findings that other cases cited by Petitioners were "inapposite" and then stated:

> "It was not in the province of the Court to weigh the imponderables and reconcile the considerations which prompt the Board to fashion an appropriate remedy peculiar to each case."

The cases referred to are apposite because they all involve the same issue as here involved, i.e., did the employer have a good faith doubt of the union's majority. The cases cited were: *Taft Broadcasting*,

WDAF-TV, et al, 201 NLRB 113 (2-13-73); *Southern Wipers, Inc.*, 192 NLRB 1355 (8-19-71); and *Viking Lithographers, Inc.*, 184 NLRB 16 (7-30-70).

In the *Taft* case, *supra*, the Board found essentially:

1. Almost 100% turnover of employees since the last contract;
2. Relative inactivity by the union in recent years; and
3. Expressions of employee dissatisfaction with the union made to company officials.

The Board pointed out that though each factor relied upon by the employer may have weaknesses standing alone, the employer relied upon all of those factors as a whole and concluded the employer provided sufficient evidence, when considered in its entirety, to cast a serious doubt upon the union's majority status.

In the *Southern Wipers, Inc.* case, *supra*, the Board held because of:

1. A 4 to 1 turnover in employees, including the departure of all but 3 of the members of the union's negotiating committee;
2. During the latter part of the time the union was inactive in the employer's plant; and
3. Several employees indicated to the employer they were glad the union had left the plant.

The Board said the employer did not violate the Act by refusing to recognize the union as the bargaining agent of his employees.

In *Viking Lithographers, Inc., supra*, the Board held the employer did not commit an unfair labor practice because:

1. The union was wholly inactive in the employer's plant;
2. Several employees expressed dissatisfaction with the union; and
3. Only 4 of the unit employees employed at the time of the election remain in the plant and two of them had announced their intention of quitting.

Neither those cases nor these cases involve the Board "fashioning" an appropriate remedy peculiar to each case. The only remedy in the 3 cases cited above and these 2 companies is to require them to bargain if they are found guilty of an unfair labor practice.

The Court below then said:

> "It suffices that none of the cases involved an industry with inherent turnover and lack of union manpower."

Nothing in those cases indicate whether or not they involved industry with inherent turnover and lack of union manpower as asserted by the Court below. But, the very fact of inherent rapid turnover must be considered as a strong, if not controlling, factual element causing Petitioners to believe the union no longer enjoyed majority status 4 and 5 years after the election, and particularly so when coupled with the union's lack of manpower. However, both Petitioners

presented other uncontradicted factual bases for their doubts of the union's majority status.

Finally, where the employer presents evidence, considered in its entirety, which casts serious doubt on the union's continuing majority, the burden shifts to the General Counsel to come forward with evidence that the union did, in fact, represent a majority of the employees in the unit. That statement was referred to by the Board in *Taft Broadcasting, supra,* decided by the Board on February 12, 1973. It follows a long line of cases, one of the earliest of which is *Stoner Rubber Company, Inc.,* 123 NLRB 1440. At page 1445, the Board said:

> "After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable. Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority, the employer need only to produce sufficient evidence to cast serious doubt on the union's majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the

> refusal to bargain date the union in fact represented a majority of employees in the appropriate unit."

(Also see *NLRB vs. J. S. Swift Company, Inc.,* 302 F.2d 342 (CA-7, 1962) and *NLRB vs. Little Rock Downtowner, Inc.,* 414 F.2d 1084 (CA-8, 1969)

There was no attempt by the union or the General Counsel to prove to the company or to the Board the union's majority status. Neither the Board nor the Court below discussed this important issue.

II.

The Decision Below Is In Direct Conflict With Decisions In The Sixth, Seventh And Eighth Circuit Courts Of Appeals As Well As With Its Own Decisions.

The Decision below is not only in serious conflict with the decision of this Court in *Universal Camera Corp., supra,* as described above, but also is in conflict with decisions of other Circuit Courts of Appeal.

Seventh Circuit Court of Appeals. *Ingress-Plastene, Inc., vs. NLRB,* 430 F.2d 542 (1970). In that case, as in the instant cases, the Board attacked individually the several grounds of the employers including the factor of significant turnover. The Court of Appeals said the company did not rely on any one reason alone, but rather on all as a whole. It then found the employer had a good faith doubt. This is in conflict with the instant cases where the Court below approved the Board's attacking the employers' grounds individually and did not consider them as a whole.

NLRB vs. Laystrom Mfg. Co., 359 F.2d 799 (CA-7, 1966). The Seventh Circuit refused to enforce the Board's bargaining order. The Board's decision (*Laystrom Mfg. Co.*, 151 NLRB #144), cited by the Board in the instant cases, said:

> "Turnover standing alone, does not provide a reasonable basis for believing the union had lost its majority status."

The factors were the close vote of 17 to 13 two years before withdrawal of recognition, 16 eligible voters out of 35 left since the election and 8 new employees hired, and the union-shop provision. The Seventh Circuit Court held those factors (as determined by the Hearing Officer) were sufficient to form the basis of a good faith doubt on the part of the employer. The Court also pointed out the union, when challenged, made no effort to disclose its majority status.

Sixth Circuit Court of Appeals. *Phillip Carey Mfg. Co., Miami Cabinet Div. vs. NLRB*, 331 F.2d 720, 734 (CA-6, 1964) (cert. den., 379 U.S. 888). That Circuit Court said there would be substantial ground for doubt concerning the union's majority status after pointing out the closeness of the vote (122 for the union and 112 against), and the large number of strikers who were replaced. It refused to enforce the bargaining order.

Eighth Circuit Court of Appeals. *National Cash Register Co. vs. NLRB*, 466 F.2d 945 (CA-8, 1974). The law judge considered the elements seriatum (as in the instant cases) and concluded that none of them individually would constitute a sufficient basis for a good faith doubt. However, the Court said,

> "Considered together we believe that good faith doubt has been demonstrated at least to the point of requiring the General Counsel to come forward with evidence that the union did represent a majority of the employees in the unit on the refusal to bargain date. This the General Counsel did not do."

That Court refused enforcement of the Board's orders to bargain.

The approach of the Court of Appeals for the Fifth Circuit to judicial review of the Board's considering seriatum the factual elements forming the basis of an employer's good faith doubt differs from the approach required by *Universal Camera Corp. vs. NLRB, supra*, and from the approach taken by other Courts of Appeal. This difference, it is submitted, results in the court's holding (1) that the Board did not abuse its discretion in not considering all the elements as a whole in which other courts find an abuse of discretion, and (2) allowing the Board to engage in all kinds of inferences and surmises not supported by the evidence. Such an approach is totally inapplicable to proper judicial review of the Board's decisions.

The Administrative Law Judge's inferences and surmises as to the effect on the minds of the Petitioners of the long union silence and intermittent negotiations and inherent turnover were just inferences and surmises and were not supported by substantial evidence. When the Court below accepted those inferences and surmises as fact it was in conflict with its own decisions in *Poultry Enterprises, Inc. vs. NLRB*, 216 F.2d 798 (CA-5, 1954) and *NLRB vs. Coats & Clark, Inc., supra*.

III.

The Decision Below Raises Important Federal Questions Of Effectuating The Purposes Of The Labor Relations Management Act, As Amended, Affecting The Rights Of Millions Of Workers.

If the decision below is allowed to stand, workers, unions, employers and the NLRB will operate under different standards of procedure in the geographical area of the Fifth Circuit than those in other areas. The Board will be able to flout the purposes of the Act requiring Board decisions to be supported by substantial evidence on the record as a whole, thus affecting the rights of millions of workers. The Board will be permitted to consider only the evidence it wants to consider and to make all kinds of inferences and surmises without substantiation in the record.

Unions will be permitted to maintain representation status over employees for indefinite periods although the employees change many times and regardless of how inept the union may be in its ability to actually represent the workers or even know the workers.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certified that three (3) copies each of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the herein styled case were mailed to each of the following on the ___ day of September, 1975:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530 and

Honorable Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
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APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LEATHERWOOD DRILLING COMPANY, Respondent

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BRAHANEY DRILLING COMPANY, Respondent.

Nos. 74-2415, 74-2421.

United States Court of Appeals, Fifth Circuit.

May 27, 1975.

Application for enforcement of orders of the National Labor Relations Board (Texas case).

Before BROWN, Chief Judge, and MURRAH* and WISDOM, Circuit Judges.

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* Of the Tenth Circuit sitting by designation.

MURRAH, Circuit Judge:

This consolidated appeal is before the Court on petition of the National Labor Relations Board to enforce the Board's orders finding that the Leatherwood and Brahaney Drilling Companies each violated §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with Local 826, International Union of Operating Engineers, AFL-CIO (the Union). Both drilling companies challenge the sufficiency of the evidence to support the Board's conclusion that neither could assert good faith doubt of the Union's majority status as a justification for refusal to bargain. We enforce the Board's orders.

Leatherwood and Brahaney are two of the fifty to sixty oil well drilling companies who operate in the Permian Basin, an area of 95,000 square miles in Western Texas and Eastern New Mexico. Companies in this area normally take less than twenty days to drill a well, then move the rig to a new site where a substantially new crew may be hired or the old crew rehired, resulting in high employee turnover. Taking this employment pattern into account, the Board fashioned and we approved a special voter-eligibility formula[1] for elections to certify the employee bar-

1 The formula grants voting eligibility to the following workers:
"All roughnecks who have been employed by [a drilling company] for a minimum of 10 working days during the 90 calendar-day period preceding the issuance of [the Board's] Decision and Direction of Election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on [the drilling company's] payroll list immediately preceding the issuance of the Regional Director's notice of election . . ."
N.L.R.B. v. Hondo Drilling Co., supra at 945.

gaining representatives in this particular area. Hondo Drilling Co., 164 N.L.R.B. 416 (1967); affirmed, N.L.R.B. v. Hondo Drilling Co., 428 F.2d 943 (5th Cir. 1970). The Union was certified in 1969 pursuant to a Hondo election conducted among the employees of each of the two companies. The validity of those elections is not questioned here.

It is settled that in the absence of special circumstances, a union's majority status, once established by a valid election, is irrebuttably presumed for a reasonable period, ordinarily one year, following the Board's certification of the union. Brooks v. N.L.R.B., 348 U.S. 96, 98, 75 S.Ct. 176, 99 L.Ed. 125 (1954); N.L.R.B. v. Anvil Products, Inc., 496 F.2d 94, 96 n.3 (5th Cir. 1974); N.L.R.B. v. Gulfmont Hotel Co., 362 F.2d 588, 589 (5th Cir. 1966). Since the certification year has expired in our case, the presumption of the Union's continued majority status is rebuttable. N.L.R.B. v. Anvil Products, Inc., supra at 96 n.3; N.L.R.B. v. Gulfmont Hotel Co., supra at 589; Terrell Machine Co. v. N.L.R.B., 427 F.2d 1088, 1090 (4th Cir. 1970), cert. denied, 398 U.S. 929, 90 S.Ct. 1821, 26 L.Ed.2d 91 (1970); N.L.R.B. v. Frick Co., 423 F.2d 1327, 1330-1331 (3rd Cir. 1970); N.L.R.B. v. Little Rock Downtowner, Inc., 414 F.2d 1084, 1090-1091 (8th Cir. 1969). And Leatherwood and Brahaney can lawfully refuse to bargain with the Union if and only if at the time of their refusal they had reasonable and good faith grounds for doubting the Union's continued majority status. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 597 n.11, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969); N.L.R.B. v. A.W. Thompson, Inc., 449 F.2d 1333, 1336 (5th Cir. 1971), cert. denied, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972); N.L.R.B. v. Gulfmont Hotel Co., supra at 589; N.L.R.B. v. Frick Co.,

supra at 1331; N.L.R.B. v. Little Rock Downtowner, Inc., supra at 1091. The sole issue for our review is whether "substantial evidence on the record considered as a whole" supports the Board's findings that neither Leatherwood nor Brahaney had reasonable grounds for such doubt. 29 U.S.C. § 160(e). We know, of course, of the Board's "very broad" discretion in the administration of the Act particularly with respect to the appropriateness of bargaining units and the certification of bargaining representatives. N.L.R.B. v. Bogart Sportswear Mfg. Co., 485 F.2d 1203, 1206 (5th Cir. 1973). A reviewing court will give "special respect" to the Board's findings and disturb them only upon a showing of abuse of discretion. N.L.R.B. v. Muscogee Lumber Co., 473 F.2d 1364, 1366 (5th Cir. 1973); Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 172, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 491, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

At the administrative hearing, the companies argued that the facts support doubt of the Union's majority status, based upon (1) the employee turnover rate; (2) the five to ten month Union silence immediately preceding withdrawal of recognition; and (3) in the case of Brahaney, evidence of employee indifference to the Union.

The Administrative Judge who presided over both cases found the following facts. The Union had not communicated with either Brahaney or Leatherwood for five to ten months immediately preceding withdrawal of recognition, but this silence, together with other delays in the two-year history of the bargaining, was caused by the Union's low manpower,

the geographic dispersal of all the Basin drilling companies, and the Union's belief that Leatherwood and Brahaney had reduced operating levels. Although employee turnover had reached 900% during the last period of Union silence and Brahaney and Leatherwood each employed less than four of the original certification voters out of the present work force of eligible voters numbering as high as seventy-seven, such turnover was not uncommon among Basin companies and had been assumed to be inherent in the industry under the Hondo formula. Harman, the attorney for both Leatherwood and Brahaney, was "highly familiar with the history of organization by this Union in the Permian Basin," and, as attorney for other Basin drilling companies, had met with a Union representative on numerous occasions during the period of Union silence toward Leatherwood and Brahaney. The sole evidence of employee indifference was testimony by a Brahaney manager that he did not hear employees speak of the Union.

The Administrative Judge concluded that (1) even 900% employee turnover did not support doubt of majority, in view of Hondo's recognition of inherent turnover in this industry; (2) occasional Union silences were known by the companies to be the result of the Union's low manpower and not any erosion of Union support; and (3) there is no substantial evidence of employee indifference to the Union. Accordingly, he found that none of the claimed grounds supported a reasonable doubt of majority and recommended that the two companies be ordered to bargain with the Union representatives and to desist from unfair labor practices. The Board adopted these findings as well as the proposed order.

The appellants do not dispute the factual data in the Board's order; but they cite other facts on the record to argue that other inferences should have been drawn or that, at the least, the burden of proof was necessarily shifted to the Union and not met by it. They emphasize the magnitude of 900% employee turnover. But in our view, this only reargues what has been decided in Hondo, i.e., that turnover is inherent in this industry and cannot be given independent significance as a sign of Union weakness. N.L.R.B. v. Hondo Drilling Co., supra at 944-946.

Disputing that the Union's low manpower and the companies' dispersal were the evident causes of the Union silence, appellants point out that an N.L.R.B. assistant was available to the two Union negotiators and that the Union's negotiations followed the same pattern in the case of at least five Basin companies. Nevertheless, we agree with the Board that such a negotiating team, faced with over fifty companies in a 95,000 square mile area, would necessarily fail to communicate with one or more companies at intervals without raising doubt of its majority status.

Finally, appellants challenge the basis for distinguishing other Board cases in which the Board found that the facts supported reasonable and good faith doubt of majority status. See Taft Broadcasting, WDAF-TV, 201 N.L.R.B. 113 (1973); Southern Wipers, Inc., 192 N.L.R.B. 135 (1971); Viking Lithographers, Inc., 184 N.L.R.B. 16 (1970). In the findings adopted by the Board, these cases are said to be "inapposite," and it is not our province to weigh the imponderables and reconcile the considerations which prompt the Board

to fashion an appropriate remedy peculiar to each case. It suffices that none of the cases involved an industry with inherent turnover and lack of Union manpower.

On the record as a whole and given the province of the Board, we agree that the appellants have not overcome the presumption of continuity of majority status and, therefore, have no room for good faith doubt of the viability of the Union's continued representation of the bargaining unit.

Enforced.

United States Court of Appeals
For The Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus No. 74-2415

LEATHERWOOD DRILLING COMPANY,
Respondent.

JUDGMENT

Before: BROWN, Chief Judge, and MURRAH* and WISDOM, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the

* Of the Tenth Circuit sitting by designation.

Respondent, Leatherwood Drilling Company, Odessa, Texas, its officers, agents, successors and assigns on March 13, 1974. The Court heard argument of respective counsel on January 16, 1975, and has considered the briefs and transcript of record filed in this cause. On May 27, 1975, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Leatherwood Drilling Company, Odessa, Texas, its officers, agents, successors and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED: Jun 18 1975
Issued as Mandate: August 1, 1975
A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit
/s/ CAROL G. LE SAGE
Deputy
New Orleans, Louisiana Aug 1 1975

United States Court of Appeals
For the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus No. 74-2421

BRAHANEY DRILLING COMPANY,
Respondent.

JUDGMENT

Before: BROWN, Chief Judge, and MURRAH* and WISDOM, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Brahaney Drilling Company, Oddessa, Texas, its officers, agents, successors and assigns on March 13, 1974. The Court heard argument of respective counsel on January 16, 1975, and has considered the briefs and transcript of record filed in this cause. On May 27, 1975, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Respondent, Brahaney Drilling Company, Odessa, Texas, its officers, agents, successors and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED:

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* Of the Tenth Circuit sitting by designation.

APPENDIX B

United States of America
Before the National Labor Relations Board

LEATHERWOOD DRILLING COMPANY

and Case 16-CA-5189

LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

DECISION AND ORDER

On November, 20, 1973, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

1 Although not affecting the ultimate conclusions of the Administrative Law Judge, we find merit in Respondent's claim that the Administrative Law Judge's Decision incorrectly referred to Allstate Construction, Inc., as a drilling contractor. The record supports Respondent's contention that Allstate is a dirt contractor. Likewise, we agree with Respondent that four of the negotiating sessions which Harman held with the Union on behalf of other contractors during the hiatus period here in question were held with Howell, the Union's business agent, rather than with Fortenberry, as the Administrative Law Judge found. These apparently inadvertent errors, however, do not affect any material findings of the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Leatherwood Drilling Company, Odessa, Texas, its officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Mar 13 1974

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[Dated 11/22/73] [JD-685-73 Odessa, Texas]

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This case was heard in Odessa, Texas, on September 25, and 26, 1973, upon a charge filed on June 11, 1973, and a complaint issued on July 24, 1973, alleging that Respondent, Leatherwood Drilling Company, violated Section 8(a)(5) and (1) of the Act by, on May 9, 1973, withdrawing recognition from and thereafter refusing to meet with the Union as the certified collective bargaining representative of unit employees. Thereafter briefs were filed by the Respondent and the General Counsel.

Upon the entire record,[1] including my observation of

1 Pursuant to Motion to Correct Transcript filed by the General Counsel, and consistent with my recollection, and the sense of the matters set forth therein, I hereby grant said motion, and the transcript is hereby amended in the following respects:

Transcript Page Number	Line Number	Reads	Should Read
12	23	"NLRB 91"	"NLRB No. 91"
16	16	"that"	"than"
17	16	"confidence"	"competence"
86	23	"exploration"	"expiration"
107	9	"interests"	"inferences"
107	10	"in" (first word in line)	omit word
109	14	"faith and their"	"faith in their"
111	7	"you are"	"your"
111	15	"prevent"	"present"
113	13	"as"	"or"
178	9	"member"	"members"
208	23	"ability"	"admissibility"
217	11	"almost misleading"	"also leading"
238	3	"free"	"frequent"
239	1	"that"	"than"

the witnesses while testifying, and careful consideration of the post-hearing briefs, I make the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Texas corporation, maintains an office and place of business in Kermit, Texas, where it is engaged in contract oil well drilling. During the calendar year preceding the issuance of the complaint, a representative period, Respondent performed services valued in excess of $50,000 outside the State of Texas.

I find that Respondent, at all times material, is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Local 826, International Union of Operating Engineers, AFL-CIO, is and has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

It is undisputed that on May 9, 1973, Respondent withdrew recognition and refused to engage in fur-

2 *Leatherwood Drilling Company*, 179 NLRB 549, 551; *Siemons Mailing Service*, 122 NLRB 81.

ther bargaining with the Charging Union, which has been certified on March 18, 1969 as exclusive representative of employees in the appropriate unit. The General Counsel argues that by said action, Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent denies any illegality attendant in its withdrawal of recognition, affirmatively claiming that said action was supported by objective considerations furnishing a reasonable basis for a good faith belief that the Union no longer enjoyed majority status. The General Counsel attempts to negate said affirmative defense, on the following grounds (1) the facts on which Respondent relies are insufficient to establish a reasonable basis for believing that the Union lost its majority, and (2) even if they were, the claim of doubt was not raised in good faith, but was a mere extension of Respondent's initial unwillingness to recognize the Union at the time of certification, and its overall bad faith approach to its statutory obligations.

B. *Concluding Findings*

1. Background

It is conceded that on March 18, 1969, the Charging Union was certified as the exclusive bargaining representative for employees in the appropriate bargaining unit, consisting of all employees working out of the Kermit, Texas, yard, including roughnecks (derrickmen and floor hands), truckdrivers, welders, mechanics, and helpers, but excluding office clerical employees professional employees, guards, watchmen, drillers and supervisors as defined in the Act.

That certification resulted from an election conducted pursuant to the eligibility formula first announced by the Board in *Hondo Drilling Company*, 164 NLRB 416. The *Hondo* formula was based generally upon the unique pattern of employment among the 50 to 60 oil well drilling concerns operating in the Permian Basin of Texas and New Mexico. Furthermore, it is a well-known fact, that the various contractors situated similarly to Respondent challenged the validity of the so-called "Hondo rule," and contested certifications based thereon to the Board and then to the Courts.

Respondent, following the certification and Union requests for bargaining, elected also to challenge the certification on this basis, and hence refused to bargain. On November 10, 1969, the Board issued its Decision and Order,[3] upholding the validity of the certification, rejecting Respondent's contentions relative to the *Hondo* eligibility formula, and directing Respondent to bargain with the Union. Initially Respondent refused to comply with this order, electing to litigate the issue in the Fifth Circuit Court of Appeals. However, C. B. Leatherwood, former President of the Company, and the individual responsible for Respondent's labor relations policy, died in September 1970. With his death, the Respondent decided to recede from its legal position. Thus, in November 1970, the Company notified the Board of its intention to abide by the Board's order and to recognize the Union.

The first bargaining session, however, was not held until March 8, 1972. A second session was held on

3 179 NLRB 549.

April 18, 1972, and the third and final meeting was on June 22, 1972. No agreement was reached. Nonetheless, following the June 22 meeting the Union did not contact the Respondent for purposes of resuming negotiations until April 19, 1973. By letter of that date addressed to Brooks Harman (Respondent's attorney and a principal company spokesman during the earlier negotiations) over the signature of J. D. Fortenberry, Senior Business Representative of the Union, a request for resumption of negotiations was made. On May 9, 1973, Respondent, through Harman, responded, advising that it ". . . declines to negotiate further for the reason it has a good faith doubt Local 826 represents a majority of the employees in the bargaining unit." In this latter regard, testimony adduced on behalf of Respondent indicates that the doubt was based upon two factors: (1) a high rate of turnover since the 1969 election, and (2) the Union's failure to seek bargaining between June 22, 1972 and April 19, 1973, a period of 10 months, which according to Respondent suggested an abandonment of the employees by the Union.

2. Analysis

As a matter of settled Board authority, an incumbent bar — gaining representative enjoys a presumption of continuing majority.[4] After expiration of the certification year *and* during periods in which a collective bargaining agreement is not in effect that presumption may be rebutted so as to release as employer from any further obligation to bargain, but

4 *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483-1484; *Little Rock Downtowner*, 168 NLRB 107, enfd. 414 F. 2d 1084 (C. A. 8).

the employer, in doing so, "must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status . . ."[5] The basic question involved here is whether the factors relied upon by the Respondent meet that standard, and thereby support a defense to the instant complaint. However, the General Counsel, in addition to arguing that they do not, in the alternative, contends that Respondent has historically acted in derogation of the principles of collective bargaining, and hence is not free to assert a good faith doubt.[6]

A. *The General Counsel's Bad Faith Argument*

In cases of this type, the Board as a matter of settled policy precludes an employer from raising a defense based upon doubt of majority, ". . . when the employer's unremedied unfair labor practices have a direct bearing and effect upon the question of majority status . . ."[7] Despite the fact that no unfair labor practice charge has been filed against Respondent in the period between November 1970, when it agreed to bargain with the Union, and the present charge filed on June 11, 1973, which is predicated on the May 9, 1973 withdrawal of recognition, the General Counsel adduced evidence as to the entire course of conduct of the Respondent dating all the way back to the certification

5 See *United States Gypsum Company*, 157 NLRB 652, 656. The standard though quoted from a representation case is equally applicable as the definition of Respondent's proof obligation on the issues framed here.

6 The General Counsel in this latter regard relies upon *Coca Cola Bottling Works, Inc.*, 186 NLRB 1051; and *United Electric Corp.*, 199 NLRB No. 110.

7 *Coca Cola Bottling Works, Inc.*, *supra*, p. 1053.

in 1969 as a bar to Respondent's affirmative defense based upon doubt of majority. In doing so, the General Counsel, through documentary evidence and 43(b) witnesses sought to establish that Respondent's approach to bargaining was in bad faith and designed "to avoid bargaining with the Union." The complaint contains no allegations that would reasonably be construed as placing such matters in issue. However, I permitted the General Counsel wide latitude in eliciting such evidence. I shall assume for purposes of this decision, without deciding,[8] that any evidence reflecting on state of mind bad faith by Respondent that might relate to employee defections was probative and relevant to the issue of whether Respondent was debarred from asserting a defense, based upon a doubt of majority.

I am convinced, on this record that the evidence adduced by the General Counsel is not sufficient to preclude the Respondent from raising such a defense. It is true that following the Union's certification, the Respondent initially refused to bargain, and did so in

8 Although background evidence, relative to state of mind, is plainly relevant, I wonder whether the license, possessed by the General Counsel, and perhaps charging parties as well, to go overboard in litigating such matters stands, or should stand, unregulated. To defend against an assertion of surface bargaining requires extensive preparation and study by counsel. Where, as here, such matters are not alleged, and not the subject of prior charges or unfair labor practice findings, at a minimum it would seem that limitations should exist to assure full notification to the party adversely affected by such litigation. Such a requirement would not only be consistent with ordinary conceptions of fair play, but could avoid the granting of time and resource consuming adjournments. I am also curious as to whether with respect to the background matters involved here, a rule of reason could not be invoked as to just how far back and how many "old bones" the General Counsel is free to exhume for inspection in support of the Charging Party's present claim.

defiance of a Board order. However, its action in this regard was predicated upon a challenge to the propriety of the *Hondo* eligibility formula, the validity of which was widely questioned by Respondent's competitors, many of whom, to the extent that they were affected thereby, similarly resisted that eligibility determination. I am unwilling to find that the assertion of this legal defense was frivolous, or that the delay in actual bargaining resulting therefrom was indicative of bad faith.[9]

I am also not persuaded that the record establishes that Respondent's conduct at the bargaining table disclosed a bad faith state of mind. Respondent accepted Union proposals, explained its position in refusing to agree, made counterproposals,[10] and duly provided all information requested by the Union.[11] Respondent's conduct up to April 1973 did not in any sense suggest a close minded approach or a refusal to accept an agreement it could live with. Concededly, the General

9 The Respondent's failure to provide information requested by the Union during this period, was no more indicative of bad faith than its refusal to honor the certification which it felt invalid.

10 I do not believe that Respondent's failure to present its contract proposal until the second bargaining session on April 18, 1972 was unreasonable. Although the Union submitted its proposal well in advance of the commencement of negotiations, no bargaining session was held until March 8, 1972, and it strikes me as unreasonable to read anything improper into the Company's submission of a contract proposal at the very next session.

11 It is true that on January 5, 1971, the Union requested information, which Respondent ultimately provided on May 31, 1971. However, this delay was adequately explained on the record, since it was clear that in January of that year the Union agreed to a suspension of negotiations because the Company had only one employee on the payroll. Thereafter, bargaining did begin and on May 11, 1971, pursuant to its intention to resume negotiations the Union wrote Respondent requesting the bargaining data. I see nothing untoward in Harman's failure to compile the data on an earlier date.

Counsel is hard pressed where, as here, he seeks to prove surface bargaining through negotiations limited to three meetings. But, as is apparent from the record, the abbreviated scope of the bargaining prior to the spring of 1973 can not in fairness be attributed to Respondent.[12] There is no indication that it refused to meet, on request of the Union at any time prior to the withdrawal of recognition.

It is true that, during presentation of the defense, the General Counsel on cross-examination of Paul Leatherwood, elicited testimony that Respondent in February 1973, had granted a general across the board increase, without notification to the Union. The General Counsel made no effort to amend his complaint in this regard, and in the circumstances, I do not find that this single incident precludes Respondent from asserting a good faith doubt. In so finding, I note that the Union, during negotiations, had demanded an immediate wage increase outside the framework of a contract. Howell, the Union's business manager, testified, with support from Leatherwood, that wage rates were not a significant issue to the parties since both the Union, due to the number of unorganized contractors, and Respondent, due to the scarcity of roughnecks, had to remain competitive in this regard. Howell further testified that it is normal practice for annual wage increases to be granted by drilling contractors in January or February, and that when this occurs, the Union, on notification, has, "accepted that wage increase without tying it to the total contract." Although Respondent may have engaged in a technical refusal to bargain by failing to consult with the Union, the surrounding circumstances preclude a conclusion that its failure to do so contributed to employee defection from the Union, or that this matter constitutes convincing proof that Respondent at all times intended to avoid bargaining with the Union.

12 The General Counsel argues that bad faith is evidenced by "Respondent's lack of efforts to expedite bargaining." Under the law, Respondent had no obligation to initiate bargaining. *N.L.R.B. v. Columbian Enameling and Stamping Co., Inc.*, 306 U.S. 501. This is particularly so, where, as here, it was the practice of the parties to meet pursuant to Union requests for such meetings.

Although, I find General Counsel's arguments based on the alleged bad faith of Respondent, totally unpersuasive, this, as will be seen *infra*, is not fatal to his case.

B. The Asserted Good Faith Doubt

I find Respondent's affirmative defense to be unsubstantiated on this record.[13]

It is true that the Union made no request for a resumption of negotiations between June of 1972 and April 1973. It is also true that in certain circumstances a persuasive argument might be made that substantial delays in requesting a resumption of negotiations may carry a strong suggestion that a union has abandoned employees in the bargaining unit, thereby enforcing an employer's belief that a union had lost its representative status. However, I cannot find, on this record, that either Paul Leatherwood, or his attorney,

13 The General Counsel's contention that the "objective facts" upon which Respondent claims a doubt of majority were not available to Respondent until after recognition was withdrawn is not supported by a consideration of the record as a whole. Cf. *N.L.R.B. v. Gulfmont Hotel Co.*, 362 F. 2d 588.

Brooks Harman, could have made any such assumption in the instant case.

It is a well known fact that the effort to organize the employees among the various drilling contractors in the Permian Basin involved a long drawn out, time consuming effort, involving extensive litigation. Organization, where successful, was attained on a single employer basis. Upon acceptance as the majority representative, the Union, following unsuccessful attempts to establish a multiemployer unit, has sought to negotiate contracts on a single employer basis. Brooks Harman, who impressed me as a man highly familiar with the history of organization by this Union in the Permian Basin, and the difficulties faced by the Union in that connection, represented several contractors during such negotiations, in addition to Leatherwood. In his brief to me, he concedes knowledge of the difficulties encountered by the Union in their efforts to organize employees, and to secure and administer contracts covering employees in this area.[14] The Union simply had too little manpower to deal immediately with complexities presented by the diverse policies and attitudes of the companies with whom bargaining would take place, operational variations among these companies, and geographical dispersal of the various employers.

From the foregoing, and other facts, I find that Har-

14 According to Paul Leatherwood's testimony all his positions taken with respect to the Union were formalized, after consultation with Harman. It is reasonable to infer that Harman, as a co-principle in Respondent's dealings with the Union, would have discussed the "pros" and "cons" of any basis for doubt held by Paul Leatherwood, and for this reason I find that the latter is properly charged with knowledge held by Harman.

man, and Leatherwood, as well, had direct knowledge as to the unlikelihood that the Union would schedule negotiating sessions, without hiatus, until final agreement had been reached. That such delays were known to be inevitable, is evident from Respondent's bargaining history. For, while the Employer took steps to comply with the Board's order to bargain and posted notices to that effect in either November or December 1970, and despite the fact that the certification year would commence running at that time, no negotiating session was held until March 8, 1972, well after the Union's protection pursuant to the certification had lapsed. This delay was with assent of the Union, and placed Harman and Leatherwood on notice that from the Union's point of view, delays would be a part of the negotiation process.

I fail to see how, Respondent could reasonably believe that subsequent delays reflected an intention on the part of the Union to abandon the Respondent's employees. This is particularly so, when one considers the fact that in the period, June 1972 through April 1973, Harman was actively engaged in negotiations with the Union on behalf of other drilling contractors, including Allstate Construction, Inc., Chaparral Drilling Co., Hondo Drilling Co., McVay Drilling Co., Rod Ric Corporation, A.W. Thompson, Inc., and Tri-Service Drilling Co. On some 23 occasions between June 1972 and April 1973, Harman and Fortenberry, in addition to their other responsibilities, met in connection with these negotiations. From the evidence relative to these negotiations it is apparent that, as to most of the contractors, there were significant time gaps between bargaining sessions.

There is no suggestion that in Fortenberry's communications with Harman during this period, he in any sense created the impression that the Union lacked an interest in attaining a contract with Respondent. On the other hand, Harman knew that Fortenberry was responsible for representation of the Union in further dealings with Respondent, and that during this period, Fortenberry was burdened with other matters.[15]

Aside from Respondent's knowledge that delays would be a characteristic of the negotiations, the unreasonableness of its interpretation of the Union's inaction is enforced by the absence of any sensible explanation as to why Respondent would assume that the Union would single out Leatherwood for abandonment, contemporaneous with its efforts to secure bargaining agreements with Leatherwood's competitors. The Union had long been involved in organization among the crews in the Permian Basin. Securing contracts with all contractors in the Basin was obviously its ultimate objective. It defies common sense to assume that this was not understood by Respondent. Furthermore, Respondent cites no facts, apart from the delay in securing negotiations, which would suggest that the Union's attitude towards it would differ from that of the other organized contractors. Respondent knew, or should have known, that the Union's interest in obtaining agreements covering Respondent's operations was no less than its objec-

15 I credit Fortenberry's testimony that he informed Harman generally of the nature of his work load and the scheduling problems they created during the period between the summer of 1972 and spring of 1973. This testimony was not subject to direct contradiction, and it is entirely plausible that such explanations were afforded by Fortenberry in view of difficulties that the parties had in scheduling negotiating meetings.

tives with respect to Respondent's organized competitors. In this regard, it should be noted that the turnover facts asserted by Respondent as evidencing a doubt of majority, are in all material respects representative of the experience of all drill companies in this area. They would not so drastically differ with the experience of contractors with whom the Union was actively negotiating during 1972 through 1973, as to warrant a belief by Respondent that the Union, being impressed by the turnover history among Respondent's employees, elected to go away. For the above reasons, I find that Respondent did not, and could not, have held a reasonable belief that the absence of communication from the Union between June 1972 and April 1973, either indicated an intention on the part of the Union to abandon the unit, or otherwise contributed to any belief that the Union lost its majority.[16]

As evidence, more directly bearing on a possible loss of majority, Respondent cites facts revealing a high degree of turnover since the election in 1969. Summarized, these facts show (1) that of the 77 names on the election eligibility list, only 3 employees remained in Respondent's employ as of the hearing date herein, (2) that of the 21 employees on a payroll list furnished to the Union on May 20, 1971, only 4 employees listed thereon were eligible to vote in the election, (3) that in the 4 years that have passed since the election, the Company employed a total of 1761 roughnecks to fill 36 jobs, and (4) that in the first 5

16 Cf. *Southern Wipers, Inc.*, 192 NLRB 816, where inactivity of a union was a factor relied upon by the Board in sustaining a good faith doubt of majority.

months of 1973, the Respondent experienced a turnover rate of nearly 900%.

There is no evidence in this case of employee defections and all of Respondent's witnesses conceded that they were unaware of any employee dissatisfaction with the Union. Furthermore, Respondent, in his brief, concedes that Board precedent does not accept turnover alone as the type of objective consideration that would legitimately support a withdrawal of recognition. Under existing Board authority, in turnover situations, ". . . new employees will be presumed to support a union in the same ratio as those whom they have replaced."[17] Nonetheless, Respondent argues that the turnover situation in the Permian Basin is unique and principles followed in other industries should not be applied to the drilling contractors involved there. A variety of arguments are advanced to support the view that turnover should be honored in this industry as a good faith defense. Most, however, relate to the high velocity of turnover. In my opinion this fails to persuade that the presumption that replacements will support a union to the same extent as their predecessors is a fallacy in this industry. If it is fair to assume that replacements will support a union where the level of turnover is 50%, this assumption is no less valid where the turnover amounts to 900%. The fact that 9 employees might in a given time period fill a single job previously held by a union supporter, does not warrant an assumption that the ninth

17 *Laystrom Manufacturing Co., supra*, p. 1484 and cases cited at footnote 7; *Printers Service, Inc.*, 175 *NLRB* 809, 812; *N.L.R.B. v. Little Rock Downtowner*, 414 F. 2d 1084, 1091.

replacement will support the union to any lesser degree than the first.[18]

But, in any event, to recognize an exception, based on turnover, to the good faith doubt rule would depart materially from the policy considerations underlying the *Hondo* formula. It should be apparent to any reader of *Hondo* and other cases involving the drilling contractors in the Permian Basin, that the Board, appreciating the turnover conditions, that existed there, committed itself to the desirability of fashioning means to assure that employees of various contractors operating in this two state area, despite the transient nature of their employment, could assert their Section 7 statutory rights "to self-organization, to form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . ." I have heretofore stated that it is fair to assume that the turnover experienced by Respondent is generally representative of that experienced by its competitors in the Permian Basin. Hence, to accept the turnover facts adduced here as substantiating a good faith doubt of majority would provide all contractors in the Basin a like defense.

18 In addition to the degree of turnover, I am not persuaded by Respondent's arguments based on observations that many of its crew members must have been employed by nonunion contractors, and that union representatives would have difficulty in maintaining regular contacts with employees. These factors are simply too remote to throw any light on the organizational preferences of crew members hired from time to time by Respondent. These arguments were not asserted as the basis of Respondent's doubt when recognition was withdrawn, and hence, though arguably relevant to the question of whether the Board should alter its view with respect to turnover in this industry, they are otherwise in the nature of afterthought and hence cannot be considered as the basis for Respondent's doubt of majority. See *N.L.R.B. v. Gulfmont Hotel Co., supra*, footnote 13.

Stable collective bargaining could hardly proceed to a meaningful state under such conditions, for, the drill contractors, on expiration of each collective bargaining agreement could thereby require the Union to reestablish its majority as a precondition for negotiation of a successor agreement. See e.g., *Emerson Manufacturing Company, Inc.*, 200 NLRB No. 33, JD p. 7.

Although ultimately the Board might sustain Respondent's contention, or even repudiate *Hondo*, as matters now stand, it is my opinion that to regard turnover as a justification for the refusal to bargain, would reduce the elections conducted by the Board in the Permian Basin to a futile exercise and render the status of certification of representatives resulting therefrom to little more than a focal point for game playing. In sum, I envision the exception to Board policy sought by Respondent, as, in practical consequence, eventually undermining both the policy considerations which resulted in the *Hondo* formula and the exercise of self-organizational rights by employees engaged in the drilling industry in the Permian Basin. Accordingly, I find, pursuant to established Board principle,[19] that turnover did not furnish a good faith doubt that the Union continued to represent a majority of Respondent's employees, and I find that Respondent, by withdrawing recognition from the Union on May 9, 1973, violated Section 8(a)(5) and (1) of the Act.

19 It is true that in *Southern Wipers, Inc.*, 192 NLRB 816, the Board accepted, "heavy turnover" as one of several factors supporting a good faith doubt of majority. That case does not reverse prior precedent to the effect that turnover *alone* will not justify a withdrawal of recognition and, though not cited by Respondent, I note my view that said decision is inapposite. See also *Viking Lithographers, Inc.*, 184 NLRB No. 16.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Considering the pattern of employment experienced by Respondent in the conduct of its operations, special provision is necessary to assure adequate publication of the provisions of the order herein. Therefore, in accordance with the earlier Board decision, involving Respondent, reported at 179 NLRB 549, 551, I shall recommend that in addition to requiring that copies of the notice be posted at the offices and yards of the Respondent in Kermit, Texas, it will be further provided that copies be posted at crew headquarters on site at all rig operations, and that copies be provided the Union for posting, if the Union is willing, at meeting places in the Permian Basin.

Conclusions of Law

1. Leatherwood Drilling Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees working out of the Kermit, Texas yard, including roughnecks (derrickmen and floor hands), truck drivers, welders, mechanics and helpers, but excluding office clerical employees, professional employees, guards, watchmen, drillers and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since March 18, 1969, the Union has been and is now the exclusive bargaining representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition on May 9, 1973 and refusing thereafter to meet with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing Findings of Fact, Conclusions of Law, and the entire record in this case, and pursuant to

Section 10(c) of the Act, I hereby recommend the following:[20]

ORDER

Leatherwood Drilling Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

> All employees working out of the Kermit, Texas, yard, including roughnecks (derrickmen and floor hands), truck drivers, welders, mechanics and helpers, but excluding office clerical employees professional employees, guards, watchmen, drillers, and supervisors as defined in the Act.

(b) Withdrawing recognition from and refusing to meet with the Union as exclusive collective bargaining representative of employees in the appropriate unit.

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20 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and embody in a signed agreement any understanding reached.

(b) Post at its offices and yards in Kermit, Texas, copies of the notice attached hereto marked, "Appendix."[21] Copies of said notice, on forms to be furnished by the Regional Director for Region 16, shall, after being duly signed by an authorized representative of the Respondent be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Similar copies shall be posted at the crew headquarters at all operating drilling sites. Copies shall also be provided the Union for posting (the Union willing) at Union halls or meeting places in the Permian Basin. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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21 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 16, in writing, within 20 days from receipt of this Recommended Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C., November 22, 1973.

/s/ Joel A. Harmatz
Joel A. Harmatz
Administrative Law Judge

APPENDIX C

209 NLRB No. 93

United States of America
Before the National Labor Relations Board

BRAHANEY DRILLING COMPANY

and Case 16-CA-5188

LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

DECISION AND ORDER

On November 14, 1973, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Acts, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Brahaney Drilling Company, Odessa, Texas, its officers, agents, successors, and assigns shall take the action set forth in the said recommended Order.

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1 Although not affecting the ultimate conclusions of the Administrative Law Judge, we find merit in Respondent's claim that in his Decision the Administrative Law Judge incorrectly referred to Allstate Construction, Inc., as a drilling contractor. The record supports the Respondent's contention that Allstate is a dirt contractor. Likewise, we agree with Respondent that four of the negotiating sessions which Harman held with the Union on behalf of other contractors during the hiatus period here in question were held with Howell, the Union's business manager, rather than with Fortenberry, as the Administrative Law Judge found. These apparently inadvertent errors, however, do not affect any material findings of the Administrative Law Judge.

Dated, Washington, D.C. Mar 13 1974

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[Issued 11/14/73] [JD-689-73
Odessa, Texas]

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This case was heard in Odessa, Texas, on September 27, 1973, upon a charge filed on June 11, 1973, an amended charge filed on June 25, 1973, a complaint issued on July 24, 1973, and an amendment thereto filed on September 12, 1973, alleging that Respondent, Brahaney Drilling Company, violated Section 8(a)(5) and (1) of the Act, by, on June 4, 1973, withdrawing

recognition from and thereafter refusing to meet with the Union, the certified collective bargaining representative of unit employees, and, by on June 4, 1973, without prior consultation or negotiation with said Union, unilaterally granting wage increases to said employees. Thereafter briefs were filed by the Respondent and the General Counsel.

Upon the entire record,[1] including my observation of the witnesses while testifying, and careful consideration of the post-hearing briefs, I make the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Texas corporation with its principal office and place of business in Midland, Texas, is engaged in the business of drilling oil and gas wells in

1 Pursuant to Motion to Correct Transcript filed by the General Counsel, and consistent with my recollection, and the sense of the matters set forth in the transcript, I hereby grant said motion, and the transcript is hereby amended in the following respects:

Transcript Page Number	Line Number	Reads	Should Read
14	11	"complements"	"implements"
53	4	"dates"	"doubts"
156	21	"contract"	"contracts"
160	7	"keep"	"receive"
166	13	"and"	"in"
182	11	"did"	"did you?"
182	12	"A.___et me. . ."	"A. Let me. . ."
191	5	"date"	"data"
194	16	"unclaimed"	"unexplained"
197	15	"correspondents"	"correspondence"
198	21	"made"	"make"
201	3	"contracts"	"contract"
222	8	"complied"	"compiled"

the Permian Basin area in Texas and New Mexico. During the calendar year preceding the issuance of this complaint, a representative period, Respondent performed services valued in excess of $50,000, of which amount services valued in excess of $50,000 were performed in states other than the State of Texas.

I find that Respondent, at all times material, is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Local 826, International Union of Operating Engineers, AFL-CIO, is and has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

This is a companion case to Leatherwood Drilling Company, Case 16-CA-5189, JD-685-73, issued simultaneously herewith. The issues presented here and substantially identical to those in Leatherwood and arise from a similar fact pattern. Thus, it is undisputed that Brahaney, on June 4, 1973, withdrew recognition and refused to bargain further with the Union as certified bargaining representative of its employees. The General Counsel contends that by said

2 *Siemons Mailing Service*, 122 NLRB 81, *Brhaney Drilling Company*, 176 NLRB 289.

action, and through a contemporaneous unilateral wage increase[3] Respondent violated Section 8(a)(5). The Respondent claims that these actions were legitimate since supported by a good faith doubt that the Union represented a majority. In response to the Respondent's affirmative defense, the General Counsel argues that the facts relied upon by Respondent fail to substantiate a reasonably based doubt of majority, and, in any event, that Respondent's entire course of conduct reveals that the doubt of majority was not asserted in good faith.

B. *Concluding Findings*

1. Background

It is conceded that on September 11, 1968, the Union was certified as exclusive bargaining representative of all derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by Respondent in the drilling operations in the area known as the Permian Basin, but excluding all tool pushers, drillers, office employees, technical employees, professional employees, guards, and all supervisors as defined in the Act.

That certification resulted from an election conducted in accordance with the eligibility formula first announced in *Hondo Drilling Company*, 164 NLRB

3 Respondent admits the allegations relative to the unilateral wage increase. Therefore whether or not such action was violative of Section 8(a)(5) and (1) turns in its entirety upon the validity or invalidity of the withdrawal of recognition. Accordingly, since the unilateral action presents a purely derivative issue, the basis for my ultimate conclusion regarding it will entail no further discussion.

416. That formula evolved as a result of the high degree of turnover characteristic of the unique pattern of employment among the 50-60 oil well drilling concerns operating in the Permian Basin of Texas and New Mexico. Various contractors situated similarly to Respondent questioned the validity of the so-called "Hondo rule" and many contested certifications based thereon to the Board and then the Courts.

Respondent, following the certification and Union requests for bargaining, elected also to challenge the certification on this basis, and therefor refused to bargain. On June 2, 1969, the Board issued its Decision and Order,[4] upholding the validity of the certification, rejecting Respondent's contentions relative to the *Hondo* formula, and directing Respondent to bargain with the Union. Respondent refused to comply with this order, electing instead to contest the validity of the certification in the Fifth Circuit Court of Appeals. On October 6, 1970, that Court enforced the Board's order.[5]

By letter dated March 30, 1971, the Union requested a meeting for purposes of collective bargaining. On May 11, 1971, the Union again wrote Respondent, enclosing a copy of the Union's proposed contract. Pursuant to agreement of the parties, the first negotiating session was held on June 22, 1971. Further bargaining sessions were held on January 20, 1972, March 14, 1972, April 14, 1972, July 21, 1972, and October 13, 1972. However, no final agreement was reached. Following the meeting in October 1972, the

4 *Brahaney Drilling Co.*, 176 NLRB 289.

5 *N.L.R.B. v. Brahaney Drilling Company*, 432 F.2d 1271.

Union by letter dated April 19, 1973, requested a resumption of negotiations. On June 4, 1973, Respondent, through Brooks Harman, its attorney, answered indicating that Respondent ". . . declines to negotiate further for the reason it has a good faith doubt Local 826 represents a majority of the employees in the bargaining unit." At that time, Respondent, without notifying or consulting with the Union, announced a general wage increase to be accorded unit employees.

C. *Analysis*

1. The asserted good faith doubt

Under well established principles, Respondent's withdrawal of recognition and contemporaneous unilateral action were violations of Section 8(a)(5) and (1) of the Act, unless the evidence adduced by Respondent establishes that said action was predicated upon objective considerations furnishing a reasonably based belief that the Union no longer represented a majority.[6] Testimony establishes that the grounds for the doubt of majority were devised by Brooks Harman, Respondent's attorney, and Phil Graves, Respondent's safety engineer and its labor relations representative. Graves testified that he questioned the Union's majority status because of (1) the high turnover rate experienced by the Company at various intervals since the election in 1968, (2) the fact that on visits to drill sites in recent months he did not hear

6 *Laystrom Manufacturing Co.*, 151 NLRB 1482; *Frito-Lay, Inc.*, 151 NLRB 28; cf. *Celanese Corporation of America*, 95 NLRB 664; *United Electric Co.*, 199 NLRB No. 110.

much discussion of the Union among the employees, and (3) the fact that the Union did not communicate with the Company between the last bargaining session on October 12, 1972, and April 19, 1973, a period of 6 months.

(a) *The Union's delay in requesting a resumption of negotiations*

It is my opinion, that the Union's failure, following the October 1972 meeting to request a resumption of negotiations until some 6 months thereafter, failed to constitute acceptable evidence of a loss of majority. The testimony of Graves makes it clear that the Union's inaction during this period was adopted as a basis for withdrawing recognition on suggestion of Harman. As in the *Leatherwood* case, I am satisfied that Harman, could not reasonably have held the view that the mere lack of communication from the Union suggested an intent on its part to abandon the Respondent's employees.

Subject to variations as to dates, personalities, and other facts, my findings and reasoning in this regard are identical to my treatment of the same issue in the *Leatherwood* case. The following is taken from my decision in *Leatherwood* and with indicated deletions and appropriate additions appearing in brackets, constitute my findings and conclusions on the record in the instant case as to the Union's delay:

> It is a well known fact that the effort to organize the employees among the various drilling contractors in the Permian Basin in-

volved a long drawn out, time consuming effort, involving extensive litigation. Organization, where successful, was attained on a single employer basis. Upon acceptance as the majority representative, the Union, following unsuccessful attempts to establish a multiemployer unit, has sought to negotiate contracts on a single employer basis. Brooks Harman who impressed me as a man highly familiar with the history of organization by this Union in the Permian Basin, and the difficulties faced by the Union in that connection, represented several contractors during such negotiations, in addition to . . . [Brahaney]. In his brief to me, he concedes knowledge to organize employees, and to secure and administer contracts covering employees in this area. The Union simply had too little manpower to deal immediately with complexities presented by the diverse policies and attitudes of the companies with whom bargaining would take place, operational variations among these companies, and geographical dispersal of the various employers.

From the foregoing, and other facts, I find that Harman, and . . . [Graves] . . . as well, had direct knowledge as to the unlikelihood that the Union would schedule negotiating sessions, without hiatus, until final agreement had been reached. [Harman and Graves attended all bargaining sessions involving Respondent and its spokesmen.] That such delays were known [by them] to be inevitable

is evident from Respondent's bargaining history. For, while the . . . [Court's decree confirming the Board's bargaining order issued on October 6, 1970, the Union made no request to bargain pursuant thereto until March 26, 1971. Furthermore, after the first bargaining session on June 22, 1971, the Union did not request a further meeting until December 7, 1971, a time lag which not only approximated the period of union inaction under consideration here, but which involved a wasting of the Union's protection from the certification.] . . . This delay was with assent of the Union, and placed Harman and . . . [Graves] . . . on notice that from the Union's point of view, delays would be a part of the negotiation process.

[It also appears that Harman had a basis for suspecting in in the period October 1972, through April 1973 based on his past experience with the Leatherwood negotiations, that the lack of communication from the Union during that period was consistent with the Union's previously manifested disinterest in negotiating while an employer's rigs were down. It will be recalled from the *Leatherwood* case, that the Union agreed to defer negotiations therein in January 1971 for a considerable period of time because Leatherwood's rigs were down. This fact is significant because in the instant negotiations Graves, in Harman's presence, at the meeting of October 13, 1972, told Fortenberry that, with the exception of one rig all the Company's rigs were

down, and that when that rig stopped operating, the Company had no further contracts.[7] It is undisputed on this record that thereafter neither Graves nor Harman informed Fortenberry, when its rigs reverted to normal operating levels. Considering Harman's understanding of the Union's position with respect to downed rigs as was evident to him from the *Leatherwood* negotiations, I cannot find that the representations as to Brahaney's operating condition as of October 13, 1972 would have been overlooked by Harman in his assessment of the reasons for the Union's subsequent inaction.]

. . . [There are additional factors that persuade me that] . . . Respondent could . . . not . . . reasonably believe that subsequent delays reflected an intention on the part of the Union to abandon the Respondent's employees. This is particularly so, when one considers the fact that in the period October 1972 through April 1973 Harman was active . . . in negotiations with the Union on behalf of other drilling contractors, including Allstate Construction, Inc., Chaparral Drilling Co., Hondo Drilling Co., McVay Drilling Co., . . . [and] A. W. Thompson, Inc. On some 18 occasions between October 1972 and April 1973, Harman and Fortenberry, in addition to their other responsibilities, met in connection with these

7 [Based upon the credited uncontradicted testimony of Fortenberry. It is noted that the General Counsel's Exhibits 6 and 7(a) show that on October 13, 1972, five of the Company's six rigs were not in operation.]

negotiations.[8] From the evidence relative to these negotiations it is apparent that, as to most of the contractors, there were significant time gaps between bargaining sessions. There is no suggestion that in Fortenberry's communications with Harman during this period, he in any sense created the impression that the Union lacked an interest in attaining a contract with Respondent. On the other hand, Harman knew that Fortenberry was responsible for representation of the Union in further dealings with Respondent, and that during this period, Fortenberry was burdened by other matters.

Aside from Respondent's knowledge that delays would be a characteristic of the negotiations, the unreasonableness of its interpretation of the Union's inaction is enforced by the absence of any sensible explanation as to why Respondent would assume that the Union would single out . . . [Brahaney] . . . for abandonment, contemporaneous with its efforts to secure bargaining agreements with . . . [Brahaney's] . . . competitors. The Union had long been involved in organization among the crews in the Permian Basin. Securing contracts with all contractors in the Basin was obviously its ultimate objective. It defies common sense to assume that this was not under-

8 In addition to his attending meetings conducted with Fortenberry as to these contractors, Harman represented other contractors, as to whom, negotiations during that period remained in an open state. These included Rod Ric Corporation and Tri-Service Drilling Co.]

stood by Respondent. Furthermore, Respondent cites no facts, apart from the delay in securing negotiations, which would suggest that the Union's attitude towards it would differ from that of the other organized contractors. Respondent knew, or should have known, that the Union's interest in obtaining agreements covering Respondent's operations was no less than its objectives with respect to Respondent's organized competitors. In this regard, it should be noted that the turnover facts asserted by Respondent as evidencing a doubt of majority, are in all material respects representative of the experience of all drill companies in this area. They would not so drastically differ with the experience of contractors with whom the Union was actively negotiating during 1972 through 1973, as to warrant a belief by Respondent that the Union, being impressed by the turnover history among Respondent's employees, elected to go away. For the above reasons, I find that Respondent did not, and could not, have held a reasonable belief that the absence of communication from the Union between . . . [October] . . . 1972 and April 1973, either indicated an intention on the part of the Union to abandon the unit, or to otherwise contributed to any belief that the Union had lost its majority.

(b) *Employee lack of interest*

As a factor supporting his doubt of majority, Graves testified that, in his visits to drill sites, he heard no dis-

cussions among the crew hands concerning the Union. Graves also testified that he had no knowledge that any employee at any time expressed dissatisfaction with the Union. Therefore it is the sense of Grave's testimony that, as a management representative, his failure to hear employees avowing their union allegiance suggested to him that the employees did not support the Union. Such reasoning is hardly persuasive. It fails to substantiate a reasonably based doubt of majority. In these circumstances, Respondent's arguments in this regard are rejected as neither constituting nor contributing to a reasonably based doubt of majority.

(c) *Turnover*

Remaining for consideration are the Respondent's contentions based upon turnover. Summarized the facts offered in support of this claim show: (1) that of the 23 names on the 1968 election eligibility list, only 1 individual remains on Respondent's payroll and he occupies a nonunit position; (2) that in the 5 years that have passed since the election, the Company employed a total of 1591 roughnecks, only 30 to 40 of whom left and then returned to the Company's employ, and (3) that in the first 5 months of 1973, the Company had employed 160 roughnecks to fill 24 to 36 jobs.

Respondent's contentions in this regard are identical to those postulated in the companion *Leatherwood Drilling* case. The numerical and statistical data on which it relies, though involving varient figures, is not so dramatically different from those presented in Leatherwood as to warrant different conclusions as to

their legal significance. Therefore, in rejecting the turnover facts as a justification for the withdrawal of recognition, herein, I do so for the reasons, equally applicable here, heretofore expressed in the *Leatherwood* case, and set forth as follows:

> . . . Respondent, in his brief, concedes that Board precedent does not accept turnover alone as the type of objective consideration that would legitimately support a withdrawal of recognition. Under existing Board authority, in turnover situations, ". . . new employees will be presumed to support a union in the same ratio as those whom they have replaced."[17] Nonetheless, Respondent argues that the turnover situation in the Permian Basin is unique and principles followed in other industries should not be applied to the drilling contractors involved there. A variety of arguments are advanced to support the view that turnover should be honored in this industry as a good faith defense. Most, however, relate to the high velocity of turnover. In my opinion this fails to persuade that the presumption that replacements will support a union to the same extent as their predecessors is a fallacy in this industry. If it is fair to assume that replacements will support a union where the level of turnover is 50%, this assumption is no less valid where the turn-

17 *Laystrom Manufacturing Co., supra*, p. 1484 and cases cited at footnote 7; *Printers Service, Inc.*, 175 NLRB 809, 812; *N. L. R. B. v. Little Rock Downtowner*, 414 F. 2d 1084, 1091.

> over amounts to 900%. The fact that 9 employees might in a given time period fill a single job previously held by a union supporter, does not warrant an assumption that the ninth replacement will support the union to any lesser degree than the first.[18]
>
> But, in any event, to recognize an exception, based on turnover, to the good faith doubt rule would depart materially from the policy considerations underlying the *Hondo* formula. It should be apparent to any reader of *Hondo* and other cases involving the drilling contractors

18 In addition to the degree of turnover, I am not persuaded by Respondent's arguments based on observations that many of its crew members must have been employed by non-union contractors, and that union representatives would have difficulty in maintaining regular contacts with employees. These factors are simply too remote to throw any light on the organizational preferences of crew members hired from time to time by Respondent. These arguments were not asserted as the basis of Respondent's doubt when recognition was withdrawn, and hence, though arguably relevant to the question of whether the Board should alter its view with respect to turnover in this industry, they are otherwise in the nature of afterthought and hence cannot be considered as the basis for Respondent's doubt of majority. See *N. L. R. B.* v. *Gulfmont Hotel Co.*, . . . [362 F. 2d 588, 592] . . .

in the Permian Basin, that the Board, appreciating the turnover conditions, that existed there, committed itself to the desirability of fashioning means to assure that employees of various contractors operating in this two state area, despite the transient nature of their employment, could assert their Section 7 statutory rights "to self-organization, to form, join or assist labor organizations [and] to bargain collectively through representatives of their own choosing . . . ." I have heretofore stated that it is fair to assume that the turnover experienced by Respondent is generally representative of that experienced by its competitors in the Permian Basin. Hence, to accept the turnover facts adduced here as substantiating a good faith doubt of majority would provide all contractors in the Basin a like defense. Stable collective bargaining could hardly proceed to a meaningful state under such conditions, for, the drill contractors, on expiration of each collective bargaining agreement could thereby require the Union to reestablish its majority as a precondition for negotiation of a successor agreement. See e.g., *Emerson Manufacturing Company, Inc.*, 200 NLRB No. 33, JD p. 7.

Although ultimately the Board might sustain Respondent's contention, or even repudiate *Hondo*, as matters now stand, it is my opinion that to regard turnover as a justification for the refusal to bargain, would reduce the elections conducted by the Board in

the Permian Basin to a futile exercise and render the status of certifications of representatives resulting therefrom to little more than a focal point for game playing. In sum, I envision the exception to Board policy sought by Respondent, as, in practical consequence, eventually undermining both the policy considerations which resulted in the Hondo formula and the exercise of self-organizational rights by employees engaged in the drilling industry in the Permian Basin. Accordingly, I find, pursuant to established Board principle,[19] that turnover did not furnish a good faith doubt that the Union continued to represent a majority of Respondent's employees, and I find that Respondent, by withdrawing recognition from the Union . . . [June 4, 1973] . . . violated Section 8(a)(5) and (1) of the Act.

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19 It is true that in *Southern Wipers, Inc.*, 192 NLRB 816, the Board accepted "heavy turnover" as one of several factors supporting a good faith doubt of majority. That case does not reverse prior precedent to the effect that turnover *alone* will not justify a withdrawal of recognition, and, though not cited by Respondent, I note my view that said decision is inapposite. See also *Viking Lithographers, Inc.*, 184 NLRB No. 16.

It follows therefore, and I further find, that the unilateral wage increase announced contemporaneous

with the withdrawal of recognition also violated Section 8(a)(5) and (1) of the Act.[9]

Upon the basis of the entire record, I make the following:

9 The Respondent's failure to substantiate its affirmative defense makes it unnecessary to consider the General Counsel's alternative theory to the effect that Respondent's entire course of conduct, since the 1968 election, established that the doubt of majority was not asserted by Respondent in good faith. The curiosity I expressed in footnote 8 of the Leatherwood case as to the propriety of a procedural system which allows the General Counsel, without prior notice, to litigate, under the endless umbrella of "background", atters dating back some 5 years ago applies here. In any event, were I to reach the merits I would reject the General Counsel's position as not substantiated by the record. I would find lacking in merit, each of the contentions made by the General Counsel in his brief as to this issue. Thus, Respondent's refusal to recognize and provide the Union with requested information, prior to the Fifth Circuit's action on October 6, 1970, cannot fairly be regarded as bearing adversely upon Respondent's state of mind, since all actions in advance of that date were consistent with its not unreasonably maintained legal position. Similarly, I see nothing untoward in the fact that Respondent did not submit until May 26, 1971, information requested by the Union on March 26, 1971. This delay was credibly explained as resulting from a breakdown in communication following a change in the identity of Respondent's counsel, the information was provided well in advance of the first bargaining session, and the delay was not shown to have in any way prejudiced the progress of negotiations. Additionally, it is my opinion that Respondent was not under a duty to initiate bargaining requests during periods when the Union was silent, and hence its failure to do so was not indicative of bad faith. See *N.L.R.B. v. Columbian Enameling and Stamping Co., Inc.*, 306 U.S. 501. Finally, I disagree with the General Counsel that dilatory behavior can be attributed to Respondent on the basis of the latter's failure to provide a counterproposal, in contract form, until the second negotiating session. *In sum*, as far as I can discern from the record, Respondent's conduct, at and away from the bargaining table, prior to June 4, 1973, was perfectly consistent with the 8(d) obligation to bargain in good faith, accordingly, were it necessary to reach this issue, I would find that the background evidence bearing on Respondent's state of mind did not preclude assertion of a doubt of majority. Cf. *Coca-Cola Bottling Works, Inc.*, 186 NLRB 1050, 1053; *United Electric Corp.*, 199 NLRB No. 110; *Printers Service, Inc.*, 175 NLRB 809, 811.

Conclusions of Law

1. Brahaney Drilling Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 826, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by Respondent in the drilling of oil wells in the area known as the Permian Basin, but excluding all tool pushers, drillers, office employees, technical employees, professional employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since September 11, 1968, the Union has been and is now the exclusive bargaining representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition on June 4, 1973, thereafter refusing to meet with the Union, and unilaterally granting a wage increase, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By the foregoing conduct, Respondent has interfered with, restrained and coerced employees in the

exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Considering the pattern of employment experienced by Respondent in the conduct of its operations, special provision is necessary to assure adequate publication of the provisions of the order herein. Therefore, as in *Leatherwood Drilling Company*, 16-CA-5189, JD-685-73, I shall recommend that in addition to requiring that copies of the notice be posted at the offices and yards of the Respondent in Midland, Texas, it will be further provided that copies be posted at crew headquarters on site at all rig operations, and that copies be provided the Union for posting, if the Union is willing, at meeting places in the Permian Basin.

Upon the foregoing Findings of Fact, Conclusions of Law, and the entire record in this case, and pursuant to

Section 10(c) of the Act, I hereby recommend the following:[10]

ORDER

Brahaney Drilling Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

> All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by Respondent in the drilling operations in the area known as the Permian Basin, but excluding all tool pushers, drillers, office employees, technical employees, professional employees, guards, and all supervisors as defined in the Act.

(b) Withdrawing recognition from and refusing to meet with the Union as exclusive collective bargaining representative of employees in the appropriate unit.

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10 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Granting wage increases or otherwise changing wages, hours, or other terms and conditions of employment, without first notifying and bargaining with the Union.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment and embody in a signed agreement any understanding reached.

(b) Post at its offices and yards in Midland, Texas, copies of the notice attached hereto marked "Appendix."[11] Copies of said notice, on forms to be furnished by the Regional Director for Region 16, shall, after being duly signed by an authorized representative of the Respondent be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Similar copies shall be posted at the crew headquarters at all operating drilling sites. Copies shall also be provided the Union for posting (the Union willing) at Union

11 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

halls or meeting places in the Permian Basin. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from receipt of this Recommended Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C. October 14, 1973.

/s/ Joel A. Harmatz
Administrative Law Judge